

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

DANIELLE CORRIDEAN, individ- )  
ually and on behalf of all )  
similarly situated persons, )

Plaintiff, )

v. )

RESTORE FINANCIAL SERVICES )  
NETWORK LLC, an Oregon corpor- )  
ation; and SERGEANTS TOWING, )  
INC., an Oregon corporation, )

Defendants. )

No. CV-06-524-HU

FINDINGS & RECOMMENDATION

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1 - FINDINGS & RECOMMENDATION

1 Sean Donahue  
DONAHUE & ASSOCIATES  
2 1625 Umpqua Bank Plaza  
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3 Portland, Oregon 97258-2021

4 Attorney for Sergeants Towing, Inc.

5 HUBEL, Magistrate Judge:

6 In a January 22, 2007 Findings & Recommendation, I recommended  
7 that motions for summary judgment brought by defendants Sergeants  
8 Towing, Inc. and Restore Financial Services Network LLC, be granted  
9 as to plaintiff Danielle Corridean's Fair Debt Collection Practices  
10 Act (FDCPA) claim. I further recommended that the Court decline to  
11 exercise its discretion to retain her claims under the Oregon  
12 Unfair Debt Collection Practices Act (OUDCPA), and the Oregon  
13 Unfair Trade Practices Act (UTPA).

14 On April 10, 2007, Judge Brown adopted the Findings &  
15 Recommendation. Judgment was entered April 11, 2007.

16 Defendants now seek awards of attorney's fees and costs. I  
17 recommend that both attorney's fees motions be denied, that  
18 Restore's cost requests be denied, and that Sergeants Towing's cost  
19 requests be granted in part and denied in part.

#### 20 DISCUSSION

##### 21 I. Attorney's Fees

22 Defendants seek attorney's fees under all three statutes upon  
23 which plaintiff brought her claims: the FDCPA, the OUDCPA, and the  
24 UTPA. Under the two Oregon statutes, attorney's fees may be  
25 awarded to the prevailing party. O.R.S. 646.641(2) (OUDCPA),  
26 O.R.S. 646.638(3) (UTPA). The problem for defendants is that these  
27 claims were dismissed because the Court declined to exercise  
28 supplemental jurisdiction over them, not because defendants

1 prevailed on the merits. Defendants are not entitled to fees based  
2 on the state claims. See Elwood v. Drescher, 456 F.3d 943, 948  
3 (9th Cir. 2006) (noting prior Ninth Circuit precedent holding that  
4 defendant is not a prevailing party under 42 U.S.C. § 1988 when  
5 claim is dismissed for lack of subject matter jurisdiction, and  
6 extending that conclusion to cases where claims are dismissed on  
7 various abstention grounds); Miles v. California, 320 F.3d 986, 988  
8 (9th Cir. 2003) (costs under Federal Rule of Civil Procedure 54(d)  
9 may not be awarded where an underlying claim is dismissed for lack  
10 of subject matter jurisdiction because the dismissed party is not  
11 a "prevailing party").

12 As to the FDCPA claim, defendants are entitled to fees which  
13 are "reasonable in relation to the work expended," but only upon a  
14 finding by the Court that the action was brought in bad faith and  
15 for the purposes of harassment. 15 U.S.C. § 1692k(a)(3).

16 Defendants contend that plaintiff's deposition testimony shows  
17 that she filed the action to punish defendants. Additionally, they  
18 argue that because the Court found a complete absence of any facts  
19 to support the assertion that plaintiff and Sergeants Towing had a  
20 transaction for consumer related goods or services as required to  
21 establish an FDCPA claim, it can be inferred that the suit was  
22 brought to harass defendants rather than to obtain a favorable  
23 judgment.

24 I disagree. First, the complete excerpt of plaintiff's  
25 deposition testimony shows that she filed the action because she  
26 believed she did not owe the debt. Exh. 108 to Hasson Declr. at p.  
27 3. Id. Plaintiff asserted more than once that she filed the  
28 action against both defendants because she did not owe the debt.

1 Id. at p. 4. She responded "yes" to the repeated question of  
2 whether she had filed the lawsuit to punish Restore or Sergeants  
3 only when pressed to provide a yes or no answer. Id. at pp. 3-4.

4 Further, plaintiff sought clarification of counsel's meaning  
5 of the word "punish." Id. Counsel explained that he meant whether  
6 her purpose in filing the action was to penalize the defendants for  
7 collecting the debt. Id. at p. 4. Seeking a penalty in connection  
8 with a desire to obtain damages for a charge she believes she did  
9 not owe, is not equivalent to filing the action in bad faith or  
10 for harassment. Plaintiff's testimony, when read in its entirety,  
11 does not support the conclusion that the action was filed in bad  
12 faith or for harassment.

13 Second, while I concluded in the Findings & Recommendation  
14 that there was "a complete absence of any facts to support the  
15 assertion that plaintiff and Sergeants had a transaction for  
16 consumer related goods or services," and thus, under the authority  
17 I found relevant, plaintiff could not establish a debt under the  
18 FDCPA, this is not support for a conclusion that the action was  
19 brought to harass defendants.

20 Plaintiff appropriately notes in her opposition to the  
21 attorney's fees motions, that the relevant case law relied on by  
22 defendants was a District Court case from the Western District of  
23 Washington, which is not binding on this Court. It is not bad  
24 faith or harassment to advocate for a different or novel  
25 interpretation of the law when there is no contrary binding  
26 precedent. Merely because plaintiff did not prevail on her claim  
27 does not mean that it was groundless or brought to harass. E.g.,  
28 Archer v. Beasley, 1991 WL 34889, at \*2-3 (D.N.J. Mar. 5, 1991)

1 (although defendant won on the issue of whether its assessment  
2 against plaintiff was a "debt" within meaning of FDCPA, it was not  
3 entitled to attorney's fees because "[m]erely incorrectly pursuing  
4 a cause of action does not, in and of itself, constitute bad  
5 faith."). Accordingly, I recommend that defendants' motions for  
6 attorney's fees be denied.

7 II. Costs

8 Defendants are entitled to costs under the FDCPA only if they  
9 meet the standard set out above for attorney's fees under the  
10 FDCPA. Because I recommend concluding that the record does not  
11 support a conclusion that plaintiff brought the action in bad faith  
12 or for the purposes of harassment, defendants may seek costs only  
13 pursuant to Federal Rule of Civil Procedure 54.

14 Rule 54(d) provides that "costs other than attorneys' fees  
15 shall be allowed as of course to the prevailing party unless the  
16 court otherwise directs[.]" In the Ninth Circuit, this rule  
17 "creates a presumption in favor of awarding costs to a prevailing  
18 party[.]" Association of Mexican-Am. Educators v. California, 231  
19 F.3d 572, 591 (9th Cir. 2000) (en banc).

20 Here, although defendants are not prevailing parties on the  
21 Oregon statutory claims, and although the state and federal claims  
22 rest on identical facts and thus, are intertwined to a certain  
23 extent, the dismissal of the state claims based on this Court's  
24 declining to exercise supplemental jurisdiction of those claims  
25 does not change the fact that defendants are the prevailing party  
26 in this federal claim and thus, are entitled to an award of costs  
27 under Rule 54(d). See Ogborn v. United Food and Comm. Workers Un.,  
28 Local No. 881, 305 F.3d 763, 770 (7th Cir. 2002) (defendant was

1 prevailing party for purposes of Rule 54(d) even though the court  
2 had declined to exercise jurisdiction over plaintiff's state law  
3 claims, when it had ruled in defendant's favor on plaintiff's  
4 federal claims); Head v. Medford, 62 F.3d 351, 355 (11th Cir. 1995)  
5 (defendants were prevailing parties for purposes of Rule 54(d) and  
6 entitled to costs when district court rendered judgment in their  
7 favor on a relatively small federal claim and declined to exercise  
8 its supplemental jurisdiction over the remaining state law claims).

9 A. Restore's Costs

10 Restore seeks \$737.23 in costs.<sup>1</sup> \$337.50 is attributable to  
11 the court reporter fees associated with the taking of plaintiff's  
12 deposition. Exh. 109 to Hasson Declr. The remaining expenses are:  
13 \$271.64 in computer-assisted legal research, \$1.89 in postage,  
14 \$56.06 for printing/copy costs, \$30 for "UPS Next Day Air," \$32.67  
15 for a copy of a transcript of a court proceeding, and \$7.57 in  
16 mileage.

17 In his declaration, plaintiff's counsel Jeffrey Hasson states  
18 that the amount of costs incurred and set forth in Exhibit 109 to  
19 his declaration, are "reasonable under the circumstances." Exh.  
20 109 to Hasson Declr. In the actual Bill of Costs submitted by  
21 Restore, Hasson declared that the costs sought are "correct and  
22 were necessarily incurred in this action[.]" Dkt. #116.

23 Exhibit 109 is a summary of the charges Hasson billed his  
24 client. No original invoices are appended, or submitted  
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26 <sup>1</sup> Restore originally sought \$802.23 in costs. Exh. 109 to  
27 Hasson Declr. However, Restore's counsel explains in a  
28 supplemental declaration that a \$65 check written to pay for a  
witness fee expense, was voided, and thus, the total costs sought  
are reduced by amount. Hasson Supp'l Declr. at ¶ 2.

1 separately, to substantiate the claimed amounts or to provide the  
2 information the Court requires to determine if the costs should be  
3 charged. For example, there is no itemization of the \$56.06 in  
4 printing and copy costs and thus, no information provided as to  
5 what per page price was charged, what documents were being copied  
6 or printed, for whom, and how many copies were made. There is no  
7 information provided as to what UPS Next Day Air was sending, why  
8 next day air was required, and no indication of why a postage  
9 charge was incurred on September 30, 2006.

10 Local Rule 54.1 requires the prevailing party seeking costs  
11 under Rule 54(d), to file an affidavit and "appropriate  
12 documentation." L.R. 54.1(a)(1). Simply filing a list of charges  
13 without supporting documentation is not "appropriate  
14 documentation." Thus, I recommend that Restore's Bill of Costs be  
15 denied.<sup>2</sup>

16  
17 <sup>2</sup> Moreover, even if the requests were adequately supported,  
18 I would recommend that several of them be denied. Specifically,  
19 I would recommend denial of the computer-assisted legal research  
20 cost, Frederick v. City of Portland, 162 F.R.D. 139, 144-45 (D.  
21 Or. 1995) (computer-assisted legal research costs not recoverable  
22 under section 1920), as well as the mileage for Hasson's trip to  
23 the courthouse. Syngenta Seeds, Inc. v. Delta Cotton Co-op,  
24 Inc., 2007 WL 1106116, at \*2 (E.D. Ark. Apr. 12, 2007) (mileage  
25 costs for attorney not found in section 1920); Horina v. City of  
26 Granite City, 2007 WL 489212, at \*2 (S.D. Ill. Feb. 9, 2007)  
27 (attorney mileage not recoverable under section 1920); Fred  
28 Meyer, Inc. v. Tischer, 1993 WL 513263, at \*2 (D. Or. 1993)  
(costs for attorney travel not recoverable under section 1920).

24 Additionally, I would recommend disallowing the \$30 charge  
25 for "UPS Next Day Air" as being similar to charges for messenger  
26 or delivery services which are ordinarily not recoverable.  
27 Frederick, 162 F.R.D. at 146 (messenger or courier fees not  
28 mentioned in section 1920 and are routinely excluded as taxable  
costs). Finally, I would recommend denying the request for  
postage. Card v. Pipes, 2004 WL 1403007, at \*1 (D. Or. June 22,  
2004) (postage is not recoverable under section 1920).

1 B. Sergeants Towing's Costs

2 Sergeants Towing seeks \$376.47 in costs under 28 U.S.C. §  
3 1920. \$343.90 is for Sergeants Towing's share of the cost of  
4 taking plaintiff's deposition. \$32.57 is for a copy of a  
5 transcript of the summary judgment oral argument. Sergeants Towing  
6 submits invoices in support of these requests. Sergeants Towing's  
7 counsel also declares that these section 1920 costs, are "correct  
8 and were necessarily incurred in this action[.]" Dkt. #114.

9 Sergeants Towing also seeks what it describes as "related  
10 nontaxable expenses" in the following amounts: \$7.28 for  
11 photocopies and \$138.11 for computerized research. Declr. of Sean  
12 Donahue at ¶ 6. Although Donahue states in his declaration that  
13 the amount of time incurred in performing the legal services was  
14 reasonable and necessary, he fails to mention that these  
15 "nontaxable" costs were reasonable and necessary. Id. at ¶ 5.

16 The invoice for the deposition shows that Sergeants Towing  
17 spent \$327.50 for one-half of the cost of the court reporter's  
18 time, and one-half of the cost of one original and one copy of the  
19 deposition transcript. Unnumbered Exhibit to Sergeants Towing Bill  
20 of Costs (dkt #114). An additional \$6.40 was for photocopying and  
21 \$10.00 was for postage and delivery of the deposition.

22 To be awarded costs for depositions, the transcript must have  
23 been "necessarily obtained for use in the case." 28 U.S.C. §  
24 1920(2). Depositions need not have been used at trial to be  
25 "necessarily obtained for use in the case." Frederick v. City of  
26 Portland, 162 F.R.D. 139, 143 (D. Or. 1995). "A deposition need  
27 not be absolutely indispensable to justify an award of costs;  
28 rather, it must only be reasonably necessary at the time it was



1 taken, without regard to later developments that may eventually  
2 render the deposition unneeded at the time of trial or summary  
3 disposition." Id. The presence of a reference to the deposition  
4 in the record is not a prerequisite to a determination that it was  
5 necessarily obtained. Id.; see also Hancock v. Albee, 11 F.R.D.  
6 139, 141 (D. Conn. 1954) (the transcript of a party's deposition,  
7 taken by the opposing party, is necessary to prepare the client for  
8 trial).

9 The deposition cost sought by Sergeants Towing, properly  
10 supported by the court reporter's invoice, is recoverable. While  
11 plaintiff objects that a conclusory statement in a cost bill  
12 application is insufficient to establish the requisite necessity,  
13 I reject that argument in this situation where the deposition at  
14 issue is that of the party plaintiff. Regardless of the ultimate  
15 use of the deposition, it would be irresponsible of defense counsel  
16 not to take the deposition of the plaintiff as part of its  
17 discovery in the case. No further articulation of necessity is  
18 required for this particular deposition cost.

19 Plaintiff objects to the \$10 delivery portion of the  
20 deposition cost. Absent some explanation of why there is a  
21 separate, additional \$10 charge for delivery, on top of the charge  
22 for the court reporter's appearance and the provision of one  
23 original and one copy of the transcript, I do not award the \$10  
24 delivery charge. Thus, Sergeants Towing may recover \$333.90 for  
25 costs associated with taking plaintiff's deposition.

26 Plaintiff next objects to the \$32.57 charge for the transcript  
27 cost. As noted above, Sergeants Towing submits a receipt for this  
28 expense. The receipt itself does not reveal the nature of the

1 court proceeding transcribed, nor does Donahue provide any  
2 information about the proceeding in his declaration. But, by  
3 reviewing the record, I am able to conclude that it must be a  
4 transcript of the summary judgment hearing.

5 Nonetheless, I do not award the cost because Sergeants Towing  
6 fails to demonstrate why the transcript was necessary. Without  
7 some articulation of the necessity, Sergeants Towing should not  
8 recover this expense.

9 As to the "nontaxable expenses," I recommend that they not be  
10 awarded. As noted above in footnote 2, I recommend no award for  
11 computerized legal research. Thus, even if this request had been  
12 properly supported as reasonable and necessary, with the  
13 appropriate documentation appended, I would recommend against  
14 awarding it.

15 I also recommend declining to award \$7.28 in copying expenses.  
16 Generally, copying expenses may be awarded under 28 U.S.C. §  
17 1920(4). Disc Golf Ass'n v. Champion Discs, Inc., 158 F.3d 1002,  
18 1010 (9th Cir. 1998) (cost of copies necessarily obtained in the  
19 context of litigation recoverable under section 1920(4)). The fact  
20 that Sergeants Towing did not seek the \$7.28 in copying costs as  
21 part of the section 1920 cost bill, but identified the costs as  
22 other "nontaxable costs," implies that the costs are not for  
23 ordinary copies necessarily obtained, but were instead, incurred as  
24 a non-ordinary expense. Because Sergeants Towing fails to provide  
25 any explanation of the expense, I recommend that it be denied.

#### 26 CONCLUSION

27 Defendant Restore's motion for attorney's fees and costs  
28 (#108, #116), should be denied. Defendant Sergeants Towing's

1 motion for attorney's fees (#111), should be denied. Defendant  
2 Sergeants Towing's Bill of Costs (#114) should be granted in part  
3 and denied in part, and \$333.90 should be awarded as costs to  
4 Sergeants Towing.

5 SCHEDULING ORDER

6 The above Findings and Recommendation will be referred to a  
7 United States District Judge for review. Objections, if any, are  
8 due June 6, 2007. If no objections are filed, review of the  
9 Findings and Recommendation will go under advisement on that date.

10 If objections are filed, a response to the objections is due  
11 June 20, 2007, and the review of the Findings and Recommendation  
12 will go under advisement on that date.

13 IT IS SO ORDERED.

14 Dated this 22nd day of May, 2007.

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17 /s/ Dennis James Hubel  
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Dennis James Hubel  
United States Magistrate Judge  
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